

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:TL-N-1386-01
RSBloom

date: April 30, 2001

to: LMSB:MCT:1706
Youngstown, OH
Attn: Donald Bouquet, Team Manager

from: Associate Area Counsel, LM:MCT:CLE

subject: Advisory Opinion: Correct Name for Forms 872 and 2848

Taxpayer: [REDACTED], EIN: [REDACTED]

Successor: [REDACTED], EIN: [REDACTED]

Years: [REDACTED], [REDACTED] & [REDACTED]

This memorandum revises our advice of April 10, 2001, provided to you regarding this matter. Our National Office reviewed our April 10, 2001, advice and agrees with our legal conclusions. However, it was suggested that the taxpayer's name on the Form 872 be modified as follows:

[REDACTED] (EIN: [REDACTED]), as successor to [REDACTED] (EIN: [REDACTED]), and as alternative agent under Temp. Reg. section 1.1502-77T for the members of the [REDACTED] group*

The corporate name above the corporate officer's signature on Form 872 should also reflect the above (without the asterisk). The language following the asterisk at the bottom of the consent should be the same as set forth in our prior advice and as is reflected in your revised Form 872 forwarded to our office by memorandum dated April 19, 2001.

Also, with respect to your revised Form 872 forwarded to our office on April 19, we note the following two very minor items: 1) the beginning "(" is missing in paragraph (2); and 2) the letter "s" should be added to the word "purpose" in the 2nd line of paragraph (3)(b).

Finally, the National Office also suggested that the taxpayer's name on the Form 2848 be modified as follows:

[REDACTED] (EIN: [REDACTED]), as successor to [REDACTED] (EIN: [REDACTED]).

If you have any questions regarding the above, please feel free to contact the undersigned at 216-522-3380 (ext. 3108).

JOSEPH F. MASELLI
Area Counsel
(Heavy Manufacturing, Construction
and Transportation)

By: RSB
RICHARD S. BLOOM
Associate Area Counsel
(Large and Mid-Size Business)

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Taxpayer: [REDACTED], EIN: [REDACTED]

Successor: [REDACTED], EIN: [REDACTED]

Years: [REDACTED], [REDACTED] & [REDACTED]

This memorandum responds to your request for assistance dated February 28, 2001. This memorandum should not be cited as precedent. As requested, we have reviewed this matter with regard to the proper name to be used on Forms 872 and 2848 after the merger of [REDACTED] into [REDACTED]. This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification.

ISSUE

Whether the taxpayer's name on the Forms 872 and 2848 should be [REDACTED] successor in interest to [REDACTED].

CONCLUSION

The proper language to describe the taxpayer on the Form 872 is "[REDACTED] (EIN: [REDACTED]) as alternative agent under Treas. Reg. § 1.1502-77T for the [REDACTED] (EIN: [REDACTED]) consolidated return group, and as successor in interest to, by way of merger with, [REDACTED] (EIN: [REDACTED])*" For sake of clarity, the foregoing name should be asterisked, as indicated, and at the bottom of the consent the following language should be inserted:

"* With regard to the consolidated tax liability of the [REDACTED] (EIN: [REDACTED]) [REDACTED]

[REDACTED] consolidated return group for the group's taxable

years ended [REDACTED], [REDACTED], and [REDACTED]."

The proper language to describe the taxpayer on the Form 2848 is: "[REDACTED] successor in interest to, by way of merger with, [REDACTED]."¹

FACTS

[REDACTED] [hereinafter sometimes referred to as "[REDACTED]"], was an Ohio corporation. It filed consolidated income tax returns, with its subsidiaries, for the taxable years ended [REDACTED], [REDACTED], and [REDACTED].² On [REDACTED], a consent to extend the statute of limitations for assessment was executed for the taxable years ended [REDACTED], and [REDACTED], extending the statute to [REDACTED]. A prior consent extended the statute of limitations for the year ended [REDACTED], to [REDACTED]. The statute of limitations on assessment for the taxable year ended [REDACTED], expires [REDACTED]. Additional time is needed to complete the examination with regard to the Company Owned Life Insurance (COLI) issue, an issue only applicable to [REDACTED]. Form 870 was secured for all other issues, with the resulting deficiency being assessed and paid in [REDACTED].

On [REDACTED], [REDACTED] merged into [REDACTED], with [REDACTED] surviving. All the shareholders of [REDACTED] exchanged their stock in [REDACTED] for cash and stock in [REDACTED]. [REDACTED] is an Ohio corporation, which as parent filed and continues to file consolidated income tax returns with its subsidiaries.

The Forms 872, Consent to Extend the Time to Assess Tax, which consecutively extended the time to assess tax to [REDACTED], were in the name of [REDACTED]. The proposed consent, which would extend the time to assess to [REDACTED]

¹As mentioned below in the Law and Analysis section, this Form 2848 is not valid with respect to the members of the old [REDACTED] consolidated group; it is valid only with respect to [REDACTED]'s liability.

²Although the taxpayer filed consolidated returns for these years and attached the required Form 851, Affiliations Schedule, to the returns, the taxpayer's name is reflected on the top front of the returns as "[REDACTED]" without any reference to subsidiaries.

June 30, 2002, for the 3 years in issue reflects the taxpayer as "[REDACTED] (EIN: [REDACTED]), Successor in interest to [REDACTED] (EIN: [REDACTED])."

After the merger, a Form 2848, Power of Attorney and Declaration of Representative, was submitted to the Service in the name of "[REDACTED] c/o [REDACTED]". A new Form 2848 has been proposed in the name of "[REDACTED], Successor in interest to [REDACTED]". These Forms 2848 are intended to cover the open Form 1120 years of [REDACTED] (FYE [REDACTED] through [REDACTED]³). Form 1120 for the year ended [REDACTED], reflects the taxpayer's name as "[REDACTED]".

LAW and ANALYSIS

I.R.C. § 1501 grants affiliated groups of corporations the privilege of filing returns on a consolidated basis. If consolidated returns are filed, the members of the group consent to be bound by the legislative regulations promulgated pursuant to the authority in I.R.C. § 1502.

Under Treas. Reg. § 1.1502-77(a), the common parent of the consolidated group is the sole agent for each subsidiary in the group and duly authorized to act in its own name in all matters relating to the consolidated tax liability of the group. The common parent remains the agent for the members of the group for any years during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time. Therefore, [REDACTED] had the authority to execute the Form 872 on [REDACTED], (and the prior consent) relating to the consolidated tax liability of the group.⁴

³The executed and proposed Forms 2848 reflect the year [REDACTED]; however, the final return filed by [REDACTED] was for the year ended [REDACTED].

⁴There is, however, an argument that the executed Form 872 is not valid with respect to the subsidiaries, because it did not contain the phrase "and subsidiaries" in the taxpayer's name. See J.A. Folger & Co. v. Commissioner, 27 B.T.A. 1 (1932), nonacq., XII-1 C.B. 16. See also I.R.M. 121.2.22.6.2.1(3) [Statute of Limitations Handbook]. The counter-argument is that the name reflected on the return for the consolidated group was used on the Form 872, it was the parties' intent that it apply to

When the common parent is about to cease to exist or has ceased to exist under state law, Treas. Reg. § 1.1502-77(d) provides rules for determining which corporation has authority to act in matters relating to the tax liability of the members of the group. The rules allow the common parent, before terminating its existence, to designate another member of the group to act as agent or, if the corporate existence of the common parent has already terminated, the remaining members may designate another member to act as agent. These designations must be approved by the district director. In the absence of any designation, the Service may deal directly with any member in respect of its liability.

Under the law of the State of Ohio, the separate existence of each constituent entity, other than the surviving entity in a merger, ceases. Ohio Rev. Code Ann. § 1701.82(A)(1) (West 1994). Therefore, [REDACTED] ceased to exist after the merger with [REDACTED]. "Authority to act on behalf of a corporation in tax matters is determined by state law." Paramount Warrior, Inc. v. Commissioner, T.C. Memo. 1976-400, 35 T.C.M. 1805, 1808 (1976). In Ohio, the surviving entity of a merger possesses all the assets, property, interests, rights and authority of each constituent entity. It is also liable for all the obligations of each constituent entity. Ohio Rev. Code Ann. § 1701.82(A)(3) and (4) (West 1994). Courts have held that federal tax liabilities are obligations of the non-surviving entities. Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985). Therefore, the surviving corporation of a merger, upon assuming the obligations of its predecessors, also retains the non-survivor's power to extend the period of limitations. Id. at 853. Likewise, it would have the authority to execute a Form 2848 with respect to the non-survivor's pre-merger years.

In 1988, the Service issued temporary regulations under I.R.C. § 1502. Treas. Reg. § 1.1502-77T(a) provides alternative agents to act for the group when the corporation that is the

the group and, under Treas. Reg. § 1.1502-77(a) and (c), the parent is duly authorized to act in its own name for all matters involving its consolidated group, including waivers extending the time to assess tax. Also, the regulation was not at issue in Folger. The case involved a year which preceded the effective date of the original predecessor of the regulation. See Alumax Inc. v. Commissioner, 109 T.C. 133, 192 n.32 (1997). At most, in the event it should be determined that the consent did not extend the time to assess with respect to the subsidiaries, the ultimate liability with respect to the COLI issue could not be assessed against or collected from the subsidiaries.

common parent of the group ceases to be the common parent. Among the alternative agents listed is the successor to the former common parent in a transaction to which section 381(a) applies. Treas. Reg. § 1.1502-77T(a)(4)(ii). Section 381(a) applies in the case of the acquisition of assets by a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with certain section 368(a)(1) reorganizations, one of which is 368(a)(1)(A). The merger in question was a statutory merger under section 368(a)(1)(A), to which section 361 applies; thus, it was a transaction to which section 381(a) applies. Consequently, [REDACTED] is an alternative agent for [REDACTED]'s consolidated group.⁵

Individuals with the authority to sign for [REDACTED] are provided with that same authority to sign on behalf of [REDACTED] (and subsidiaries with respect to the statute extension only) as a result of the merger and temporary regulations. Such an individual should sign the consent and power, with his title, under the name of the taxpayer as set forth above in the Conclusion portion of this memorandum.

It must be noted that [REDACTED] is only an alternative agent for the old consolidated group for the limited purposes of issuing a notice of deficiency to the group and for executing a waiver of the statute of limitations for the group. Treas. Reg. § 1.1502-77T(a). Therefore, [REDACTED], as alternative agent, can execute the waiver of the statute of limitations for the group, but it cannot execute a Form 2848 on behalf of the group or its individual members. Consequently, if you intend to send members of the old [REDACTED] group documents other than the statutory notice or intend to have the members execute documents other than the waiver of the statute of limitations, you must deal with each member separately. In other words, a power of attorney executed by [REDACTED] as successor to [REDACTED] will not cover the members of the old [REDACTED] group. You have to deal with each individual member/corporation separately. Alternatively, the remaining members of the old consolidated group can, subject to

⁵Despite the note in footnote 4 above, we suggest that [REDACTED] execute the new consent both as successor to [REDACTED] and as alternative agent for the old consolidated group. Even if the prior consents are challenged and determined not to be valid with respect to the subsidiaries, the new consent would be valid with respect to [REDACTED] for all 3 years in issue and with respect to [REDACTED] and its old consolidated group with respect to the year ended [REDACTED].

the Service's approval, designate an agent under Treas. Reg. § 1.1502-77(d) for all purposes, including executing waivers extending the statute of limitations. Even if a new designated agent is selected to act for the members of the old group, you should nevertheless also deal with [REDACTED] in its capacity as the successor to [REDACTED].

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. Also, if you have any questions regarding the above, please feel free to contact the undersigned at 216-522-3380 (ext. 3108).

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